

Loyal Order of Moose Lodge, #1590

Permit No. RC80-93343
District 3

900 West Jefferson Street
Tipton, Indiana 46072

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

I.

BACKGROUND OF THE CASE

The Permittee, Loyal Order of Moose Lodge, #1590, 900 West Jefferson Street, Tipton, Indiana 46072 (Permittee) is the holder of a type 211-3 Alcohol and Tobacco Commission (ATC) permit, #RC80-93343.¹ On or about October 7, 2002, permittee filed its application for renewal which was assigned to the Tipton County Local Alcoholic Beverage Board (LB) for hearing. The LB heard the renewal request on November 25, 2002 and on that same date, voted 3 – 0 to deny the application.² The ATC adopted the recommendation of the LB on December 3, 2002 and denied the renewal.

The permittee filed a timely notice of appeal and the matter was assigned to the ATC Hearing Judge, Mark C. Webb (HJ). The HJ set the matter for hearing on September 9, 2003, and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The permittee was represented by Joseph F. Quill. There were no remonstrators. The HJ took judicial and administrative notice of the entire contents of the file in this matter and now submits his Proposed Findings of Fact and Conclusions of Law to the ATC for consideration.

¹ Liquor, beer and wine retailer (social club) located in an unincorporated area. This designation appears to be in error as the Moose Lodge is a fraternal club. However, when the club applied for its license in 1994, the then-present way of numbering permits did not allow for a designation of a fraternal club in an unincorporated area. Therefore, the club was classified as a social club to give it a permit type number.

Today, such clubs are designated as a 211-5 type permit, a fraternal club located in an unincorporated area.
² According to the LB voting sheet, members Raymond Chapman, Frank Letsinger and Kevin Akers, the Commission's designated member (*see*, IC 7.1-2-4-6) voted to recommend denial of the renewal because of repeated gaming violations dating back to at least 1998, in violation of 905 IAC 1-27-2 and IC 35-45-5-3. LB member John Colter, though present for the hearing, abstained from voting because his employer bank has a business relationship with the permittee. A tape recording of the LB hearing did not reveal any details of this relationship.

II.
EVIDENCE BEFORE THE LOCAL BOARD³

- A. The following individuals testified before the LB in support of the permittee in this cause:
1. John Burnett, lodge administrator. Mr. Burnett admitted to the presence and use of the gaming machines found inside the permit premises. He testified that although the lodge has had gaming violations in the past, they have always paid whatever fine was assessed against them and moved on. He said that the lodge made no attempt to conceal the machines and that they used the proceeds for numerous worthy community causes.⁴ They correctly report all income and have been audited by the IRS in recent years with no problems. Mr. Burnett lamented that because of Indiana's lowering of the legal limit for intoxication from .10% to .08%, that business in the bar of the permit premises has fallen between 18% and 20% because people are afraid to drink as much for fear of being considered intoxicated under the new law.⁵ In response to a LB inquiry, Mr. Burnett stated that without the gaming machines, they would, of necessity, have to cut back on the amount of charitable giving the lodge makes and they would have to find alternative sources of income. He also said that if individuals could not partake in the gaming activities at the permit premises, that they would go somewhere else for that same activity, which would be a loss of revenue for the lodge.
- B. The following exhibits were introduced before the LB in support of the permittee in this cause: None.⁶

³ The information presented before the LB consisted almost entirely of the contents of State Excise Police Officer Steven Toleos's report of June 8, 2002, which was presented through LB member Kevin Akers. Toleos himself did not appear or testify at the hearing. Additionally, no witnesses actually testified against the renewal of the permit. An officer of the permittee did appear and answer board members' questions regarding the report.

⁴ Mr. Burnett gave numerous examples of generous financial support that the Tipton Moose Lodge has provided to various charitable causes in Tipton County. This information was uncontroverted and this HJ accepts it as true. The Commission does not begrudge the gifts which the permittee bestowed on the community even though they have been supported through illegal gaming activities. However, the fact remains that these machines and the dollars that come from them are unlawful and their very presence inside these premises severely threatens the continued existence of the alcoholic beverage permit in question here.

⁵ Mr. Burnett stated that these same conditions were threatening the financial bottom lines of numerous lodges throughout the United States and abroad.

⁶ The LB transcript indicates that Mr. Burnett showed the LB actual examples of the gifts the lodge had made to charitable community causes, but never officially offered them into the record. Thus, these exhibits are not before the Commission on appeal. However, *see*, fn. 4, *supra*.

- C. The following individuals testified before the LB in favor of the remonstrators and against the permittee in this cause: None.⁷
- D. The following exhibits were introduced before the LB in favor of the remonstrators and against the permittee in this cause: None.

III.
EVIDENCE BEFORE THE ATC

- A. The following individuals testified before the ATC in favor of the permittee in this cause:
 - 1. Thomas Dombrosky, governor of the lodge and part-time administrator. Mr. Dombrosky testified that prior to the November 25, 2002 LB hearing, they had never been notified that the presence of the illegal gaming machines inside the lodge could in any way jeopardize the permit in this cause, the prior violations notwithstanding. He further testified that in June, 2002, shortly after the notice of violation in this case, that the machines were removed and have not ever been returned to the lodge.⁸ He stated that the moneys received from the machines were poured back into the community and given to numerous charitable causes, none of which went to enrich any one person. He said that by virtue of the June 8, 2002 violation, that the State gained approximately \$4900 – a \$3500 fine and forfeiture of the \$1400 contained in the payout drawer. Prior to the ATC hearing, he attempted to have members of the LB sign an affidavit stating that so long as the gaming machines were out of the premises, that they would have agreed to renew the permit in this case, similar to what they had done for another local lodge which had lost its permit under almost identical circumstances.⁹ However, the LB

⁷ The evidence against the lodge came in the form of Officer Toleos's June 8, 2002 report. *See*, fn. 3, *supra*.

⁸ This testimony appears to possibly contradict what is one interpretation of the taped LB hearing of November 25, 2002, namely, that the machines, though removed shortly after the June 8, 2002 violation, were returned to the premises some two months later because the lodge was unable to meet some of its financial commitments. However, Mr. Dombrosky testified that Mr. Burnett told the LB that the machines had indeed been removed. Nonetheless, his testimony being unequivocal, this HJ will accept the premise that they were removed after the violation and have not been returned since.

⁹ Prior to the ATC hearing in this case, this HJ heard an appeal from the Tipton American Legion, Permit No. RC80-00192, which had had its permit not renewed under almost identical circumstances. In that case, the permittee having removed the machines shortly after the violation, reinstalled them a couple of months later because of declining revenue, and they were still there at the time of the LB renewal hearing. However, during the appeal hearing, the permittee presented affidavits from the LB members who stated that had the permittee removed the machines at the time of the LB hearing, they would have recommended renewal of the permit, thus obviating the need for an appeal.

members would not sign the affidavits in this case. According to Mr. Dombrosky, when the machines were removed, the lodge found itself in a financial hole with no money for community projects. They have added some other revenue making activities, including more bingo nights and a turkey shoot, but estimates that they have only recovered around 50% of the revenues they had under the illegal gaming machines. Mr. Dombrosky further testified that the loss of the lodge's alcohol permit would force the lodge to close because most of their daily revenue comes from the bar area.

- B. The following exhibits were introduced before the ATC in favor of the permittee in this cause:¹⁰
1. Affidavit (unsigned) of Frank Letsinger, LB member, stating that the possession of gaming devices was the sole reason the permit was not renewed, and had the LB known that the devices had been permanently removed, that the recommendation would have been different.¹¹
 2. Affidavit (unsigned) of Raymond Chapman, LB member, stating that the possession of gaming devices was the sole reason the permit was not renewed, and had the LB known that the devices had been permanently removed, that the recommendation would have been different.¹²
- C. The following individuals testified before the ATC in favor of the remonstrators and against the permittee in this cause: None.
- D. The following exhibits were introduced before the ATC in favor of the remonstrators and against the permittee in this cause: None.

¹⁰ This was a highly unusual action, and upon further review, the Commission strongly discourages this approach, and this HJ should, upon retrospect, have declined to accept the affidavits in the *American Legion* matter. First and foremost, it puts LBs in difficult positions as here, where there is no articulable basis the differing treatments the American Legion, on the one hand, and the Moose Lodge, on the other hand, received before this LB. Second, even if both matters were remanded for rehearing, it seems to this HJ, given these circumstances, that the outcome for the Legion would have been favorable, while the outcome for the Moose would have been unfavorable, again, with no reasonable basis for this distinction. From the Commission's perspective, *Oscro Drug* forbids this result.

¹¹ Mr. Letsinger refused to sign this affidavit despite having signed an identical one for the American Legion. However, it goes to the fairness of the permittee's treatment before the LB in light of its treatment of the Tipton American Legion, and thus bears on whether the LB's recommendation was arbitrary or capricious.

¹² Mr. Chapman refused to sign this affidavit despite having signed an identical one for the American Legion. However, it is clearly relevant. *See*, fn. 10, *supra*.

IV.
FINDINGS OF FACT

1. The Permittee, Loyal Order of Moose Lodge, #1590, 900 West Jefferson Street, Tipton, Indiana 46072 (permittee) is the holder of a type 211-3 Alcohol and Tobacco Commission (ATC) permit, #RC80-93343. (ATC File).
2. Said permit was first issued on November 2, 1993, and has been annually renewed thereafter. (ATC File).
3. Permittee possessed illegal gaming machines on its premises on June 7, 2002. (LB Hearing; ATC Hearing).
4. Permittee received a notice of violation for the above incident on June 8, 2002. (LB Hearing; ATC Hearing).
5. Within days of the violation, the illegal gaming machines were removed from the premises and at least through September 9, 2003, had not been put back. (ATC Hearing.)
6. The permittee contributes to numerous community charitable causes. (LB Hearing; ATC Hearing).
7. Much, if not all of the financial gifts come from the proceeds of the illegal gaming activity. (LB Hearing).
8. Permittee has attempted to find other sources of income to replace that which was attributed to the illegal gaming machines, and has replaced approximately 50% of it and continues to contribute to various charitable causes within the community.
9. Permittee has been cited for illegal gaming activities in the past. (ATC File).
10. The loss of the alcoholic beverage permit in this case would cause the permit premises to close down as it cannot keep its doors open without the revenue generated from the bar area. (ATC Hearing).
11. Another fraternal club in Tipton lost its alcoholic beverage permit under almost identical circumstances, but during the appellate process, the LB members signed affidavits stating that had that lodge removed its illegal gaming machines at the time of the LB hearing, it would have recommended renewal of the permit. (ATC Hearing; ATC Records).
12. The LB members refused to give this permittee similar treatment despite the fact that they had removed their illegal gaming machines within days of the violation and they have never been returned.¹³
13. Permittee has pledged that it will no longer allow gaming machines in its permit premises in the future. (ATC Hearing).¹⁴
14. There were no remonstrators who objected to the permittee's request for renewal of its permit. (LB Hearing; ATC Hearing).

¹³ This HJ is somewhat troubled by the differing treatment given these two permittees by the LB, particularly, since the Moose Lodge had permanently removed the machines right after the notice of violation as opposed to the American Legion, which put them back before the date of their LB hearing.

¹⁴ Prior to the issuance of these Findings and Conclusions, this HJ requested an inspection by the District 3 Excise Police and was informed that upon an unannounced inspection, that there were no gaming machines of any kind inside the permit premises.

15. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

V.
CONCLUSIONS OF LAW

1. The permittee, Loyal Order of Moose Lodge, #1590, 900 West Jefferson Street, Tipton, Indiana 46072 (Permittee) is the holder of a type 211-4 Alcohol and Tobacco Commission (ATC) permit, #RC80-93343. (ATC File).
2. Said permit was first issued on November 2, 1993, and has been annually renewed thereafter. (ATC File). The ATC's standard of review of the LB's recommendation is *de novo*. IC 7.1-3-19-11(a).
3. Under a *de novo* standard, permittee is permitted to present new evidence before the Commission. *Id.*
4. Evidence that the LB had previously denied renewal of a competing lodge's permit due to the presence of illegal gaming machines but later reconsidered and agreed in writing that because the machines had later been removed, that they had no objection to the Commission granting the renewal during the appellate process, and where the instant permittee had taken the same action sooner, and the LB denied to extend the same courtesy to this permittee constitutes action of an arbitrary and capricious nature on the part of the LB. *See, Indiana Alcoholic Beverage Commission v. Osco Drug, (1982), Ind.App., 431 N.E.2d 823.*
5. The Commission may reverse the LB's action in recommending the denial of said permit if it finds that the LB's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. IC 7.1-3-19-11.
6. The LB's action in recommending denial of the renewal application of the permit in this case was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to a constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; or (e) unsupported by substantial evidence. *Id.*¹⁵

¹⁵ This HJ would note that this case was a very close call. Local communities are free to decide that these machines, the possession of which is a Class D felony, are undesirable and that businesses which use them are not welcome there and should not be supported. The Commission will generally support these decisions. However, it is the totality of the circumstances here, including, but not limited to the disparate treatment by the LB between this permittee and the Legion under virtually identical facts, the lack of any remonstrance from the community against this permittee, and the firm and unmistakable understanding of the permittee before this HJ that no further violations of this type would be tolerated which tips the balance ever so slightly in favor of the renewal of this permit.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the finding of the LB to recommend denial of the renewal application in this matter was arbitrary and capricious and not based on substantial evidence and cannot be sustained. And it is further ordered, adjudged, and decreed that the evidence adduced at the ATC appeal hearing was in favor of the Permittee and against the recommendation of the LB. The appeal of Permittee, Loyal Order of Moose Lodge, #1590, 900 West Jefferson Street, Tipton, Indiana 46072, for the renewal of this Type 211-3 permit, #RC80-93343 is granted and the recommendation of the LB in this matter is reversed.¹⁶

DATED: _____

MARK C. WEBB, Hearing Judge

¹⁶ It is strongly urged that all permittees heed the concerns issued in these findings as the Commission considers this case to be highly unusual, given the unique combination of factors raised.